No. 21,232

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee

v.

HANNA NICKEL SMELTING COMPANY, a corporation, and THE HANNA MINING COMPANY, a corporation

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

and

ANSWERING BRIEF AS CROSS-APPELLEE.

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I N D E X

C I T A T I O N S

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I REPLY BRIEF

1. Introduction.

As we developed in our opening brief, this case arises from Hanna's contract to construct a new type of nickel smelting plant for the United States with capital funds furnished by the government, operate that plant, and sell the refined nickel to the government at its "cost of production." Hanna also got the right to buy the plant from the United States for a price equal to 7 and 1/2 percent of the capital

expended in its construction, an option which it exercised.

In this suit the government contends that Hanna overcharged the United States for refined nickel by includin in its "cost of production" some $1,400,000 in unauthorized expenditures for capital equipment it acquired for the plant and seeks recovery of that sum. In substance, we assert (1) that Hanna's acquisition of the smelter equipment in sui was not part of "costs of production" but rather was require by the contract to be purchased out of the capital funds advanced by the United States; (2) that Hanna's expenditures of capital funds for such equipment was permissible under the contract only if the government agreed that the equipment was "necessary or advisable," and (3) that government funds could not be used to purchase capital equipment beyond the dollar limit specified in the contract.

Thus, as our opening brief demonstrated, by charging capital expenditures to "production costs" Hanna breached its contract with the United States in several respects: First, it expended $1,400,000 in public funds fo capital items of smelter equipment in disregard of the government's contract right to pass on whether such equipme

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1/ Hanna's profit under this contract (some $10,000,000 in addition to its option to purchase the smelter at a very favorable price) came on the nickel ore which it sold to th government for use in the new smelter. In addition, Hanna received a management fee of $100,000 per year for operatin the smelter for the government. See our opening brief, pp. 2-11.

was actually necessary. Second, it expended public funds for capital items beyond the express $22,875,000 limit which the government contracted to make available for such expenditures. And, third, because the option price for the smelter was set by the contract at a fixed percentage of the government capital expended upon it, by charging the disputed items to "production costs" rather than to capital expenditures, Hanna enabled itself to obtain the disputed $1,400,000 in capital equipment absolutely free upon exercising its option to purchase the plant. On this basis we sought recovery of Hanna's unauthorized expenditure of $1,400,000 for smelter equipment which it passed along to the United States in the guise of "production costs".

The court below ruled that Hanna could not justify charging 38 of the items in suit (acquired for $231,605) to "cost of production" and awarded judgment to the government accordingly, a finding which Hanna does not challenge in this appeal (See Hanna brief, p. 56). The lower court upheld, however, Hanna's treatment of the 178 [2/] remaining

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2/ The reference to 216 disputed items in our opening brief (See, e.g., p. 11) includes both the 178 items with which this appeal is concerned and the 38 items which the court found Hanna improperly charged to the government and Hanna does not challenge here.

items (costing approximately $1,160,000) as production costs chargeable to the United States under "accounting practices in the smelting industry." For the reasons developed at length in our opening brief (pp. 37-85), we submit that the holding adverse to the government is plainly incorrect and contrary both to the terms of the contract and the evidence in the record. Far from rebutting our contentions in this regard, we think the answering brief of appellees underscores the correctness of our position.

2. Hanna's construction of the contract leaves key provisions without meaning.

The principal ground upon which the court below rested its decision was that, though the contract between them did not say so expressly, "the parties intended to apply accounting practices common to the smelting industry". (253 F. Supp. 791). The distinguishing feature of smelting accounting is that "replacements or improvements, even if long lived, are expensed unless they materially increase the capabilities or value of the plant considered as a whole" (ibid.) Thus, in awarding judgment to Hanna with regard to the 178 disputed items of equipment, the district court found that these items--though purchased for more than $1,160,000--increased neither the value nor the capability of the smelter and were therefore properly "expensed" (i.e., charged to "cost of production" borne entirely by the United States) not withstanding the fact that this equipment

concededly has a long useful life and is commercially valuable. We pointed out in our opening brief (pp. 47-53, 61-63) that the lower court's (and Hanna's)interpretation renders meaningless the express contract provision that "capital advances" were to be used "for such replacements or improvements of the Facility which are agreed by the Contractor and the Government to be necessary or advisable during the period of this contract." (Art. IV, par.1, emphasis supplied) As we there noted, under the court's theory no "replacement" would ever be capitalized. Indeed, this case graphically illustrates that point. Here, more than a million dollars worth of "improvements" and "replacements" in the smelter were effected by Hanna without increasing the plant's capabilities "considered as a whole".

In its answering brief (pp. 35-37), Hanna does not controvert our position regarding the effect of court's reading of the contract. Nor does it suggest any significant purpose for the contract language requiring replacements and improvements to be acquired out of government capital funds, and only if the government agreed. Rather, it merely says in substance that the court's result is precisely what the parties intended. (Hanna br. pp. 35-37) That contention makes a mockery of the contract. It means that Hanna could (and did) unilaterally replace items of equipment costing hundreds of thousands of dollars as it saw fit while shifting the full cost of these new

acquisitions entirely on the back of the United States. Moreover, Hanna could (and did) then obtain these items for its own commercial use absolutely free by exercising its option to acquire the plant. (The option price was fixed at 7 1/2 percent of the government capital advanced--but Hanna charged all the replacement machinery to "cost of production" thus not increasing its option price). In short, to read the contract as Hanna would have it would be like giving it a key to the Treasury. It makes virtually meaningless the contract's express dollar limitation on government capital advances contained in the contract as well as eliminates the government's right to insure that, as the contract period neared a close, Hanna could not expend government funds to replace expensive equipment for its own rather than the government's benefit.

On the other hand, our reading of the contract gives meaningful effect to the contract terms dealing with expenditures for "replacements" and "improvements" without being either harsh or unfair to Hanna's interests. It is to be borne in mind that Hanna's profit (ultimately in excess of $10,000,000) was to come from selling the nickel ore to the government, not from the operation of the nickel smelter. The latter was to be carried out at "cost" plus an agreed management fee (See our opening brief, pp. 2-4.) In addition, Hanna had the right to acquire the smelter for 7 and 1/2 percent of the capital advances expended in its

construction, subject to the $22,875,000 limit on capital advances specified in the contract. Reading the contract as we urge--and as we think it plainly should be read--means only that Hanna had to obtain the government's consent before making major expenditures for replacements and improvements to equipment and, in the event Hanna opted to buy the smelter, that Hanna pay 7 and 1/2 percent of the cost of such replacements and improvements which Hanna itself deemed "necessary or advisable". There is nothing unfair or overreaching about this requirement. We submit that the court below erred in rejecting the government's interpretation of the contract which, unlike Hanna's construction, gives reasonable effect to all the terms in the agreement. As this Court has noted, a meaningful construction of a contract is always preferable. Gray v. Travellers Indemnity Co., 28 F.2d 549 (C.A. 9); United Artists Corp. v. Strand Productions, 216 F.2d 305 (C.A. 9), See also, Restatement of the Law, Contracts, §236(a). In the language of Judge Browning, speaking for a unanimious court in Osborn v. Boeing Airplane Company, 309 F.2d 99, 103 n.8:

> "Where the choice is open, language relating to the terms of a contract will be so interpreted that the contract will be fair and reasonable rather than unfair and unreasonable."

In the case at bar, it is the government's interpretation which is "fair and reasonable". The district court was plainly mistaken in rejecting it.

3. The evidence shows that neither party contemplated the use of "smelting accounting" under this risk-free government contract.

It is not disputed that it is only if the parties intended to apply the unique accounting practices of the smelting industry that the 178 disputed items of equipment could be fully charged to the United States as "costs of production". We demonstrated in our opening brief that specific provisions of the contract itself (which of course control where applicable) required replacements and improvements to the smelter be paid for out of capital advances. We also showed (and Hanna's brief does not deny) that capital treatment of such acquisitions would be required under generally accepted accounting practices in industry at large (See our opening brief, pp. 77-91). We do not believe anything in Hanna's brief demonstrates that the parties intended to use "smelting accounting" under the contract in suit. On the contrary, we think a conspicious o mission from Hanna's argument makes plain the correctness of our position.

It is of course patent that the use of "smelting accounting" was extremely advantageous to Hanna under this contract. For under this system, Hanna would be able to (and did) make expensive improvements to and even replace a million dollars of high priced equipment in the smelter

as it saw fit, while at the same time placing itself in a position to acquire that equipment for itself entirely at government expense. Yet the contract nowhere provides that it is to be understood in the light of the singular practices inherent in "smelting accounting". And though Hanna's brief purports to trace the history of the negotiations leading up to the contract in suit (See pp. 27-30), nowhere in that history does Hanna point to a single reference to the unique accounting procedures in the smelting industry which it now insists both parties intended to apply all along. We think it incredible that if Hanna--much less the government--intended "smelting accounting" to govern, it would not even so much as make one mention of that fact during the entire course of contract negotiations. (We note that Hanna did not put its own contract negotiators on the stand.) It was Hanna--not the United States--which was in a unique position to be aware of the accounting practices peculiar to the smelting industry. It was Hanna--not the United States--which stood to gain considerably if smelting accounting applied. Hanna's negotiators skillfully and diligently drove a hard bargin in that company's interest. It is inconceivable that they would have left the company's right to use "smelting accounting"--literally a million dollar question--totally unmentioned not only in the contract but even in their proposals. This is particularly so when they were dealing with the government, a party not in the smelting business,

not negotiating an ordinary commercial smelting contract, and nowhere shown to be familiar with the special accounting practices adopted by some members of that industry.

We submit there is good reason why "smelting accounting" was not mentioned. It is inappropriate to the type of operation contemplated by these parties. This was not an ordinary competitive commercial smelting contract made in the context of a risky industry. On the contrary, it was for Hanna a risk-free, cost-reimbursable venture under which it stood to make enormous profit and the right (but not the obligation) to purchase a modern smelter at a fraction of its initial cost. In these circumstances, the complete absence of any reference to "smelting accounting" anywhere in the contract or anywhere in the contract proposals, we submit, conclusively demonstrates that the district court was plainly mistaken in ruling that the parties intended such practices to govern the contract in suit.

4. Hanna's contention regarding the application of estoppel to this case are without merit.

A. Hanna's brief does not suggest--and indeed it was not the case--that anyone in the government's employ ever expressly appooved of its application of "smelting accounting" practices to the contract in suit. On the contrary, Hanna acknowledges that it adopted these practices on its own. Rather, it notes that government auditors inspected its books in 1957, saw the accounting practices

being applied, and did not object to them. It is solely on this basis that Hanna urges, as to the period after January 1, 1958, that the failure of the government's auditors to object amounted to the government's "implied acquiescence" in Hanna's continued use of those accounting practices.

We pointed out in our opening brief, however, (pp. 86 ff.) that "implied acquiescence" by government employees is not enough to bar the government's claim, the Supreme Court having so held in circumstances far more egregious than those at bar. Utah Power & Light Co. v. United States, 243 U.S. 398, 409. To the same effect see this Court's decision in United States v. Riggins, 65 F.2d 750, 751 (C.A. 9); and Fansteel Metallurgical Corporation v. United States, 172 F. Supp. 268, 271 (Ct. Cls.). 3/ Hanna does not dispute the authority of Utah Power & Light Co. Instead, it tries to avoid the impact of that decision by asserting that the case is of limited application and governs only "situation[s] involving an exercise of the sovereign power of the United States." (br. p. 44). In Hanna's view, the holding of Utah Power & Light Co. does not apply to this case where the government is attempting to enforce contract rights, which Hanna characterizes as merely "proprietary,

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3/ See also United States v. California, 332 U.S. 19, 39-40, and Beaver v. United States, 350 F.2d 4, 7 (C.A. 9).

not sovereign" (br. p. 46). The short answer to that contention is that Hanna's purported "distinction" between "sovereign" and "contract or proprietary" rights has not been accepted by the Supreme Court, this Court and other courts of appeals. Thus, in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, an agent of FCIC had erroneously misled respondents into the belief that they had contracted with FCIC to insure their wheat crop. In overturning a lower court decision that FCIC was precluded from denying such coverage because a private insurance company in similar circumstances would have been bound, the Court expressly rejected the distinction Hanna would have this Court make, ruling (332 U.S. at 383-384, emphasis supplied):

> And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore, conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the government pedigree of the type of a particular activity or the manner in which the government conducts it.

This Court both quoted and applied this language in United States v. Willoughby, 250 F.2d 524, 530 (C.A. 9).

The dual nature of federal activities which Hanna espouses was also rejected in Fed. Land Bank v. Bismark Co., 314 U.S. 95. There it was urged that a State's tax on the money lending activities of land banks was constitutionally permissible because, though the banks were instrumentalities of the federal government, in making loans to individuals the banks were engaging in "proprietary" rather than "governmental" functions. In holding the State tax unlawful, the Supreme Court expressly rejected any such dichotomy in governmental activities (314 U.S. at 102):

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

Similarly, in United States v. 93 Court Corporation, 350 F.2d 386 (C.A. 2, 1965), certiorari denied, 382 U.S. 984, the Second Circuit ruled that the doctrine of laches does not bar the United States from foreclosing a mortgage given to the R.F.C. as security for a business loan, also rejecting the distinction Hanna urges here by holding (350 F.2d 389):

> This rule allows the government to maintain belated actions to enforce public rights regardless of the "governmental" or "business" nature of the government-sponsored activity that created the rights.

And in Aiken v. United States, 260 F.2d 936 (C.A. 9), this Court squarely rejected the argument that the government could be barred from enforcing contractual rights against its lessee by failure to prosecute its claim diligently, stating (260 F.2d at 938, emphasis added):

> Finally, appellant argues that the government waited too long in making its demand for payment. However, this action is in contract, and it is well settled that the United States may sue at any time upon a contract, and neither limitation nor laches binds it.

The reason why the distinction Hanna urges cannot be drawn is interent in the very reason why negligence and laches cannot be imputed to the government. The classic explanation for the rule is that of Mr. Justice Story in United States v. Hoar, Fed. Cas. No. 15,373 (2 Mason 311, 26 Fed. Cas. 329, 330, D. Mass. 1821, emphasis supplied):

> The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its rights,***is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.

Clearly, that rule is equally applicable to protect the public Treasury regardless of the "sovereign", "governmental" or "proprietary" nature of the government activity which

created the right in suit. See, also, United States v. Summerlin, 310 U.S. 414, 416; United States v. Rossi, 342 F.2d 505 (C.A. 9); McIndo v. United States, 194 F.2d 602 (C.A. 9); Cf., United States v. DeQueen and Eastern Railroad Co., 271 F.2d 597, 601, and cases cited. The authorities which Hanna cites, we submit, do not support its contrary contention. 4/

In addition, while we do not think it relevant, this is a situation involving an exercise of the "sovereign"

4/ United States v. Bostwick, 94 U.S. 53, dealt with the construction of a lease, not estoppel or laches; Krupp v. Federal Housing Administration, 285 F.2d 833, (C.A. 1), was a suit on an express warranty made by the government in a contract to sell real estate, no estoppel was involved; In McQuagge v. United States, 197 F. Supp. 460 (W.D. La.), the government's contracting officer finally accepted and paid for certain work as completed according to contract specifications under a contract providing that such acceptance could not be reopened except on evidence of fraud not present in the case, no question of "implied acceptance" was involved; United States v. Certain Parcels of Land, 131 F. Supp. 65 involved reliance on the affirmative representation of a government employee with actual authority to settle the land controversy in suit, and in any event is of doubtful authority since this Court declined to follow that decision in the later case of Beaver v. United States, 350 F.2d 4, 7, 9. Insofar as the Court of Claims in Branch Banking and Trust Co. v. United States, 98 F. Supp. 757, certiorari denied, 342 U.S. 893, and Roberts v. United States, Great American Insurance Co., 357 F.2d 938, employed language supporting the proposition that the government may be estopped by an act of waiver in the same manner as a private contractor "when the government is acting in its propriatary capacity," that language is in conflict with the express contrary holding of the Supreme Court in Federal Crop Ins. Corp. v. Merrill, supra, and they are therefore incorrectly decided.

power of the United States notwithstanding Hanna's contrary assertions. As Hanna acknowledges (br. p.2) the contract in suit was negotiated--as a matter of "urgency"--solely because "there was during the Korean War an acute shortage of nickel for critical defense needs, and no domestic source of supply". The government entered into this arrangement with Hanna not as an ordinary commercial venture, but to insure the United States' ability to obtain supplies necessary to the needs of national defense. It is disingenuous to imply that the government here expended more than thirty million dollars of public funds simply to enter the commercial nickel smelting business. (See our opening brief, pp. 2-4).

B. Hanna has also misconceived the thrust of our opening brief on the estoppel question. We agree that the court below cannot be said to have been "clearly erroneous" in finding that the government's auditors knew, or should have known, about Hanna's accounting practices as of January 1, 1958. However, Hanna is not correct in stating (br. p. 42) that we have abandoned the contention that the government could not be bound by their knowledge alone. Indeed, that is precisely the point we are making. Mere silence on the part of those auditors constituted at the very most "implied acquiescence" in Hanna's actions. And such "implied acquiescence" by itself, we demonstrated, is insufficient to preclude the United States from asserting its rights. In other words, this is a much stronger case than

one in which some government employees actually makes an erroneous misrepresentation. Here, no representations at all were ever made to Hanna by any government employee. And we certainly do not concede that anyone with actual authority to do so ever waived the government's rights under this contract or approved Hanna's accounting practices. The auditors had no such authority themselves. Hanna nowhere points to any evidence establishing that any person who did have such authority was even aware of Hanna's accounting practices in 1958, much less approved of them. The law is clear, we submit, that one who relies on the representations of a government agent must show that in fact the agent had actual authority to bind the United States. Federal Crop Ins. Crop. v. Merrill, 332 U.S. 380; United States v. Stewart, 311 U.S. 60, 70; Sutton v. United States, 256 U.S. 575; Whiteside v. United States, 93 U.S. 247, 256-257; Beaver v. United States, 350 F.2d 4 (C.A. 9).

Nor does Carrier Corporation v. United States, 328 F.2d 328, 164 Ct. Cls. 666, cited by Hanna, hold otherwise. In that case the majority of the Court of Claims found that the official with actual authority (an Assistant Secretary of the Army) had actual knowledge of the facts of the case and of the actions of his subordinates. It was his actual knowledge which the Court held to have bound the government to his subordinate's express representations. See 328 F.2d at 337 and findings of fact 25-28 at 166 Ct. Cls. 709-710.

Imputed knowledge is not enough. 5/ Even assuming Carrier Corporation to have been properly decided on its facts (but see the dissenting opinion of Judge Davis at 328 F.2d 339, 340-342), Hanna did not, and could not, make a comparable showing here. There is simply no evidence in this case--and Hanna has cited none--which establishes that anyone with actual authority to approve Hanna's accounting practices was at all aware of them, much less authorized their use under this contract. 6/

5/ See, Fansteel Metallurigical Corporation v. United States, 271 F. Supp 268, 271 (Ct. Cls. 1959); United States v. Riggins, 65 F.2d 750, 751 (C.A. 9); United States v. DePew, 100 F.2d 725, 728 (C.A. 10); Jones v. United States, 106 F.2d 888, 890-891 (C.A. 5); Halverson v. United States, 121 F.2d 420, 422-423 (C.A. 7), certiorari denied, 314 U.S. 695; United States v. Cooper, 200 F.2d 954, 956 (C.A. 9); United States v. Kiefer, 228 F.2d 448, 450-451 (C.A.D.C.), certiorari denied 350 U.S. 933; United States v. Sinor, 238 F.2d 271, 276 (C.A. 5); United States v. Willoughby, 250 F.2d 524, 528-531 (C.A. 9); United States v. Accardo, 113 F. Supp. 783, 785 (D. N.J.), affirmed on the opinion of the district court, 208 F.2d 632 (C.A.3), certiorari denied, 347 U.S. 952.

6/ Indeed, even if the contracting officer were aware of those practices his authority to approve them is doubtful. "The law is well settled that a contracting officer can chang change the terms of a contract to the benefit of the government but is not given authority to make a change which would adversely affect the Government." Fansteel Metallurigical Corporation v. United States, supra 172 F. Supp. at 270 (Ct. Cls.).

Finally, we call to the Court's attention that, at all events, estoppel is at most a partial defense to the government's claim on the merits. As the district court's opinion notes (253 F. Supp. 793), $841,403.62 of the government's claim relates to capital equipment purchased by Hanna and charged to production costs before January 1, 1958, the date as of which the lower court found that government agents "impliedly acquiesced" in Hanna's accounting practices. Consequently, the government's right to recover the $841,403.62 in expenditures improperly made by Hanna before that date would not be barred by estoppel in any case.

II

ANSWERING BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

1. The district court correctly reformed the contract to express the true intent of the parties.

(a) Introduction and summary

Under the contract in question, Hanna was obligated to operate the smelter at maximum production and to deliver all the nickel refined to the government at its cost of production or at an agreed upon ceiling price, whichever was lower. This obligation was to continue until 125,000,000 pounds of nickel was delivered or until June 30, 1962, whichever occurred frist. Hanna was required to decide by that time whether it would exercise its option to purchase the smelter. 7/

By the early 1961 Hanna had already delivered to the government all but approximately 19,500,000 pounds of nickel contracted for, leaving less than a full year's production still to be delivered. In February, 1961, Hanna manifested its desire to exercise its option to purchase the plant (pl. ex. 136-1D), but it also desired an extension of

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7/ See our main brief, p. 9, fn. 14, for the terms of the option.

several years in which to deliver the final amount of nickel in order to obtain "the opportunity to use most of the smelter's production during that period to develop a commercial nickel market".[8/] The government, while not opposed to an extension of delivery time per se, wished to protect itself against any rise in production costs which might follow should Hanna not run the smelter at maximum capacity during any extended delivery period. The government also wished to make sure that, by agreeing to an extension of the delivery period, it would not be deprived of the benefit of Hanna's lowering costs of production, which at this point had been decreasing annually.

To achieve these ends the parties negotiated Amendment 5 to the contract. In substance, the amendment extended Hanna's time to deliver the remaining refined nickel three years to June 30, 1965, and relieved Hanna of the obligation to run the smelter at the maximum practicable rate and to deliver all the product to the government. The remaining 19,500,000 pounds of nickel were to be delivered to the government over the extended period at Hanna's cost of production (as before), or at a new ceiling price of 58.77 cents per pound, whichever was lower. It is this new ceiling price which is in dispute here.

8/ Hanna's brief, p. 69.

The district court found (as the government had contended) that the new ceiling price "was computed by an agreed formula which was based upon the difference between the company's cost of production in 1959 and 1960" (253 F. Supp. at 795). The court found, however, that Hanna had improperly included in its 1959 and 1960 cost figures over two hundred thousand dollars of capital expenditures, the effect of which was to raise the ceiling price under the formula. The court therefore reformed the contract so as to compute a ceiling price by applying the true cost figures to the formula. The result was to lower the ceiling price some 1.24 cents to 57.53 cents per pound. Accordingly, the court awarded judgment to the government for $241,798.32, plus interest. 9/

In this appeal, Hanna does not challenge the district court's finding that it overstated its production costs by

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9/ Hanna actually delivered only some 2,186,409 pounds of nickel under the 1961 agreement. After this suit was instituted, the parties entered into a termination agreement in which Hanna paid the government the approximate difference between the 58.77 cents lb./ceiling price and the market price of nickel for the remaining 17,313,454 pounds of nickel not delivered. They further agreed that if the court should reform the ceiling price downward, Hanna would pay the government an additional sum equal to 17,313,454 times the amount of the reduction. We do not understand Hanna to dispute that, if the decision of the court is affirmed, the mathematical computation of the court's award to the government is correct. See 253 F. Supp at

more than $215,000.00 (Hanna's brief, p. 56). Rather, it urges that the court erred in finding that the parties agreed on a formula for computing the 1961 ceiling price. In Hanna's view, the parties agreed only upon a new, fixed ceiling price. Accordingly, though that price was expressly computed on the basis of Hanna's own improperly inflated 1960 costs of production, Hanna asserts that the court was not entitled to reform the contract to reflect the true cost figures. We respectfully submit that Hanna's challenge to the court's decision on this issue should be rejected. For as we now show, the evidence supports the court's finding that the parties agreed to compute a new ceiling price by use of a formula, and the court properly reformed the contract to conform to the formula which the parties intended to apply.

(b) The meaning of the 1961 Amendment was a question of fact for the district court; its resolution of that issue must be upheld because not "clearly erroneous."

It is elementary that a written agreement which, through mutual mistake, fails to express the intention of the parties may be reformed to express that intention. Restatement of the Law of Contracts, §504. As the Supreme Court long ago stated, "[t]he jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted;***." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892). In this case, the district court found that the parties mutually intended that

court found that the parties mutually intended that the new ceiling price for nickel established under Amendment 5 be computed according to a formula which compared Hanna's 1960 costs of production with its 1959 costs, and that the amendment mistakenly applied incorrect cost figures for those years. On this basis the court reformed the contract by substituting the correct figures in formula. The district court's findings regarding mutual intent and mutual mistake are ones of fact which this Court has held may not be set aside unless "clearly erroneous". Lundgren v. Freeman, 307 F.2d 104, 113 (C.A. 9). 10/ In this case, there is ample support in the record for the trial court's findings on the parties' intent and mistake. The courts decision on the reformation issue must, therefore,

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10/ It is equally well established that where extrinsic evidence is introduced in aid of interpreting provisions of a written instrument--as in this case--the question of interpretation is one of fact for the trier of facts. West v. Smith, 101 U.S. 263; Rankin v. Fidelity Trust Co., 189 U.S. 242, 252-253; Pacific Portland Cement Co. v. Ford Mach. & Chem. Co., 178 F.2d 541, 549 (C.A. 9); Lowell O. West Lumber Sales v. United States, 270 F.2d 12, 17, (C.A. 9); Williston on Contracts (3rd Ed.) §616. See also, United States v. A. J. McKinnon, 289 F.2d 908 (C.A. 9), reversing 178 F. Supp. 913 (D. Ore.)

be affirmed. For, as this Court has stated in a case presenting striking parallel circumstances:

> We may not substitute our judgment [as to whether a contract should be reformed] if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which would have been drawn by reasonable men.

Lundgren v. Freeman, supra, 307 F. 2d at 113 (C.A. 9).

(c) The district court was not mistaken in finding that the parties agreed upon a formula for determining a new ceiling price for nickel in the 1961 amendment to the contract.

Hanna initiated the proposal to extend the delivery periods and terminate the contract, offering to supply the government the remaining nickel contracted for at 60 cents per pound or its actual cost of production, whichever was lower (Pl. Ex. 126-1D and 4D). As we noted, Hanna was already under contractual obligation to the government to supply that nickel at its cost of production. Thus, as far as the government was concerned, the significant part of Hanna's offer was the 60 cent ceiling price.

During the negotiations which followed Hanna's offer, the government was represented by Mr. James V. O'Dwyer (Pl. Ex. 136). Hanna's offer was rejected by the government because, as Mr. O'Dwyer testified (Pl. Ex. 136, p. 15), Hanna's operating costs had been descending over the years and, "should operations under the contract continue normally and

the material being produced at capacity in twelve to fifteen months, we could certainly expect to have the benefit of a lower -- a price lower than 60 cents." In other words, the government negotiators were of the view that if Hanna continued to operate the plant at full capacity its production costs -- and thus the cost of nickel to the government -- would drop below 60 cents per pound. They wished the government to retain the advantage of these projected lower costs notwithstanding any agreement which extended delivery dates and authorized Hanna to operate the smelter at production levels less efficient than full capacity. To achieve that goal, Mr. O'Dwyer testified, the government negotiators took the approach that the ceiling price should be determined by taking "the actual difference between the 1959-60 costs and deduct that" from the 60 cent figure proposed by Hanna (Pl. Ex. 136, p. 15).

Mr. O'Dwyer further testified that he obtained those 1959 and 1960 costs from figures "supplied by the Hanna Nickel Company", that he used them to compute the government's proposals for a new ceiling price under the formula mentioned, that he drafted a letter from the Acting Commissioner of Defense Materials to Hanna embodying the government's counter-proposal (id. at 16), and the proposal in that letter is computed under the formula described (id. at 17). That letter, which both explains and illustrates the formula under which the government was prepared to agree

to an extension of the delivery period, reads in pertinent part as follows (Pl. ex. 136-5D, emphasis added):

> We are agreeable in principle to the development of a mutually satisfactory arrangement under which the aims expressed in your communication will be accomplished. It is essential, however, that the Government satisfy itself insofar as it is possible to do so that it will not pay any more for the ferronickel to be delivered over the period of 4 1/2 years than it would pay were the material to be delivered over the course of the next year to 15 months as provided in our Contract DMP-50. To this end we call your attention to the inclusion of non-recurring charges in 1959 and 1960 and to a net reduction in production costs for the calendar year 1960 as compared with that of 1959 of 1.2 cents per pound, calculated as follows:

	Cost Per Lb.
Average for calendar year 1959	$ .6130
Less: Storage Cost 1959 $26,292.64	.0013
Adjusted Average for 1959	$ .6117
Average for calendar year 1960	$ .6001
Less: Storage Cost 1960	.0004
Adjusted Average for 1960	$ .5997
Reduction in cost from 1959 to 1960	$ .0120
Adjusted average for calendar year 1960	$ .5997
Less Reduction in cost from 1959 to 1960	.0120
Projected Costs for Balance of Contract	$ .5877

> We think it is reasonable to project a production cost for 1961 at $ .5877 per pound, and that this is a necessary precaution on the part of the Government since it has been indicated to us that during the next 12 to 15 months you may not find it practicable to operate at capacity.
>
> Subject to a satisfactory adjustment of all the other conditions of your proposal, with respect to which we think there will be no problem, we are willing to execute such amendatory agreements as are necessary to consummate the transaction on the

> basis of $ .5877 per pound or your actual average cost of production during the year in which the ferronickel is delivered to the Government, whichever is lower. This contemplates that the proposed agreements will be effective as of March 31, 1961.

The government's letter thus sets out with precision the formula and figures used. The proposed ceiling price of 58.77 cents mentioned in the letter was determined, as the Court can easily check, by simple mathematical application of the formula.

Hanna responded by letter dated March 14, 1961 (Pl. Ex. 136-6D, emphasis added):

> This is to advise you that Hanna Nickel Smelting Company accepts the proposal set forth in your letter of March 9 in regard to terminating Contracts DMP-49, DMP-50 and DMP-51, and substituting therefor provisions to extend to June 30, 1965 the balance of deliveries under present Contract DMP-50 at a price of $ .5877 per pound of contained nickel or our average cost of production per year, whichever is lower. Your proposal contemplates that these arrangements will be effective as of the end of this month.
>
> I assume that you will arrange to have prepared and furnished to us drafts of the appropriate agreements to carry out these understandings.

It is on the basis of the government's proposal, and Hanna's acceptance of that proposal, that Amendment 5 to the contract is to be understood. That Amendment reads in pertinent part:

> * * * The 19,499,863 pounds of contained nickel shall be produced by the Contractor after March 21, 1961 and shall be delivered to the Government at such time or times after March 31, 1961 and prior to June 30, 1965 as the Contractor

> in its sole discretion shall determine, at a price per pound of contained nickel which shall be equal to (a) the Contractor's average actual cost of production per pound of contained nickel in the calendar year in which such ferronickel is delivered to the Government or (b) $0.5877, whichever is less.

On the basis of this evidence, the court below found that the ceiling price of 58.77 cents per pound adopted by the parties in Amendment 5 "was computed by an agreed formula which was based on the difference between the Company's costs of production in 1959 and 1960." The court having also found that Hanna had erroneously included in those cost figures matters which should not have been expensed (a finding which Hanna does not challenge), decreed that: "The 1961 agreement will be reformed by applying the Company's costs for 1959 and 1960, as adjusted to conform to this opinion, to the formula employed at the time of the original agreement" (253 F. Supp. at 795).

Hanna urges that the court erred in finding that it had intended to agree to a formula to determine a new ceiling price. The substance of its contention is that it was assenting only to the figures (i.e., 58.77 cents) contained in the letter, and that reformation was not appropriate because there was no mutual mistake about that figure. But as its letter states Hanna gave its assent to the government's proposal, and that proposal was plainly based on the formula in the letter. To be sure, the government's proposal did not use the word formula. But the letter set

out the formula itself and specified that it was being used "to project a production cost for 1961" because, if the contract delivery period were extended, Hanna "may not find it practicable to operate at capacity", thus precluding the possibility of determining Hanna's actual production costs while operating at maximum efficiency for 1961.

In sum, we submit there can be no doubt from the face of the letter itself, that the government was proposing a new ceiling price based on a formula -- expressly illustrated in that letter -- to protect itself because Hanna's actual future production costs might be increased for reasons relating to its search for commercial markets and not because of its operations in supplying nickel to the government. And there can also be no doubt that the government's proposed formula intended to use Hanna's actual costs for 1959 and 1960. It simply makes no sense to assume that the parties were negotiating on any other basis, for the formula is meaningless if the crucial "cost" figures are assumed to include capital expenditures.

We think the foregoing review of the evidence firmly supports the court's finding that the parties negotiated a formula for a new ceiling price, and that the court did not err in reforming the contract to reflect the true figures which the parties intended to use in the formula. At all events, however, that evidence provides ample basis on which the court below could reach a conclusion to that effect.

Even if another court might differ on the inferences to be drawn from the evidence, it would not be grounds for rejecting the lower court's decision here. For, as this Court has stated, in such circumstances "it cannot be said that the conclusion reached by the trial court is clearly erroneous." Pacific Portland Cement Co. v. Ford Mach. & Chem. Corp., 178 F.2d 541, 549 (C.A. 9).

Nor is there merit to Hanna's alternate contention that the trial court's decision to reform the ceiling price is a "gross inequity." (Br. p. 80). Surely there is nothing inequitable about refusing to give effect to $215,110 in "costs" which, as the court below particularly noted "the Company's [own] witnesses frankly admit to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp at 792), a conclusion which Hanna does not challenge here.

For the reasons stated, we submit that the court's decision on reformation is correct and should be affirmed.

2. The district court did not abuse its discretion in awarding prejudgment interest to the government.

The district court awarded judgment for $231,506.28 to the United States in compensation for capital expenditures which Hanna had improperly charged to the United States as reimbursible production costs (see 253 F. Supp. at 796). Hanna does not challenge this portion of the judgment, but does dispute the court's award of prejudgment interest. Hanna tacitly recognizes (br. 81) -- as indeed it must -- that prejudgment interest is a matter within the district court's discretion to award in appropriate circumstances.[11/] Hanna contends, however, that prejudgment interest was "inequitable" in this case because the amount it owed the government was "unliquidated" and "essentially incapable of ascertainment before trial" (br. 82). Hanna's arguments on this point, we submit, are plainly without merit.

a. The court awarded judgment to the government only for these items which Hanna's own witnesses "frankly admit[tid] to be capital items under the [smelting] accounting practices previously discussed" (253 F. Supp. at 792), and which the district court found that the Company had "expensed in 1960 and 1961 solely to obtain reimbursement" from

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11/ Funkausen v. Preston Co., 290 U.S. 163; Miller v. Robertson, 266 U.S. 243, 258; United States v. U.S. Fidelity Co., 236 U.S. 512, 528; Continental Oil Co. v. United States, 184 F. 2d 802, 822 (C.A. 9), 5 Corbin, Contracts, § 1046 (1964 ed.); McCormick, Damages, § 54 (1935 ed.).

the government. (id. at 793). Hanna does not challenge those findings. In other words, Hanna had no accounting excuse for billing and accepting payment from the government for these capital items. Thus, from the moment the government paid for them, Hanna had the use of the government's money without justification. The courts have long recognized that one who has made an overpayment to another, or one who has been underpaid, is entitled to interest from the date of the erroneous payment. Ardelphia Co. v. St. Louis S. W. Ry. Co., 249 U.S. 134; Mitchell v. Riegal Textile, Inc., 259 F.2d 954, 956 (C.A.D.C.). Hanna was under a legal duty to return the overpayments to the government when they were received. At that time the government had had a right of action to recover the money and a matured and liquidated debt became immediately due.

Moreover, there is no doubt that the debt was certain and liquidated. The amount of the government's claim was easily ascertained by simple mathematical computation. As stated in McCormick, Damages, supra, p. 216:

> [W]here the amount sued for may be arrived at by a process of measurement of computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear [pre-judgment] interest. See also 5 Corbin, Contracts, supra, §1046, p. 284.

In this case, there has never been a dispute between the parties about the correctness, arithmetically, of the amount of the government's claim. All parties have accepted and

agreed to the amount of each individual item in issue as evidenced by Plaintiff's Exhibit 82. In this respect there is no difference between this litigation and a lawsuit where the plaintiff is suing the defendant on two notes of $1,000 each. In both instances the amount controversy is fixed, certain and liquidated; the only area of dispute is defendant's liability on each item. That Hanna denied its liability to the government does not transform the claim to one for an unliquidated amount, just as the denial of liability by the maker of the hypothetical $1,000 notes does not compel the classification of that suit as a claim for an unliquidated sum. As the Tenth Circuit held in Anderson-Prichard Oil Corporation v. Parker, 245 F.2d 831, 837:

> The fact that defendant, in good faith, denies the claim or the breach of contract does not prevent the allowance of interest. Restatement, Contracts, §337, comment (d); 12/ United States v.

12/ Restatement, Contracts, §337, comment (d), states: "The fact that the defendant in good faith denies the existence of the debt or other duty asserted by the plaintiff, or denies that he has committed any breach of contract, does not prevent the allowance of [pre-judgment] interest as damages for his breach."

Stephanidis, D.C. E.D.N.Y., 41 F.2d 960; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 126 P.2d 644; Texas Co. of Mexico, S.A. v. Roos, 5 Cir., 43 F.2d 1, certiorari denied 282 U.S. 902 51 S.Ct. 216, 75 L.Ed. 794.

See also, McCormick, Damages, supra, pp. 215-216.

The rule could hardly be otherwise, for if it were, by the simple expedient of denying his liability, a defendant could easily avoid the payment of prejudgment interest and thereby retain the plaintiff's money without charge. 13/

13/ The same considerations, we submit, also justified the court's award of prejudgment interest on the reformation claim. The contract was reformed because the production cost figures Hanna supplied included the identical unjustifiable capital expenditures discussed. Here, too, as a result of its own unjustified action, Hanna caused the government to overpay for nickel, and the government is entitled to be fully compensated for the use of its money.

b. Moreover, even assuming, arguendo, that the government's claim was not liquidated, the district court nonetheless was acting within its discretion in allowing prejudgment interest as part of the government's damage award. The Supreme Court has recognized (Concordia Ins. Co. v. School Dist., 282 U.S. 545, 554-556):

> * * * that even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U.S. 243, 257-259, and cases cited. See also Standard Oil Co. v. United States, 267 U.S. 76, 79; Berhard v. Rochester German Ins. Co., 79 Conn. 388, 397.

That rule has regularly been applied in instances where, though the exact amount due was not ascertainable until trial, the court in its discretion believed prejudgment interest appropriate in order to provide full compensation to the injured party. See, e.g., St. Paul Mercury Indemnity Co. v. United States, 201 F. 2d 57, 60-62 (C.A. 10); E. I. Dupont De Nemours & Co. v. Lyles & Long Const. Co., 219 F. 2d 328, 341-342 (C.A. 4); Railroad Credit Corporation v. Hawkins, 80 F. 2d 818, 825-826 (C.A. 4), certiorari denied, 298 U.S. 667; Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp., 311 F. 2d 389 (C.A. 4). Here, the district court plainly considered the interest award as necessary to make whole the government's loss as a result of Hanna's use of its money, stating (253 F. Supp. at 796, emphasis added):

> This is a classic case of unjust enrichment. From the dates of overpayments, the Company has had the use of the Government's money. The amounts of the overpayments, as well as the dates, have always been subject to ready calculation, once the existence of a breach was determined. I have held that the Company breached the contract only in those instances where it was unable to justify its accounting decisions under the standard of generally accepted accounting practices. The Government is entitled to interest at the rate of six per cent per annum from the dates of overpayment, both on the $231,506.28 overpaid under the 1961 agreement.

We respectfully submit that the Court's decision in Continental Oil Co. v. United States, 184 F. 2d 802 (C.A. 9), a case in which a defendent similarly opposed the government's claim for prejudgment interest in a breach of contract suit on the ground that the claim was "unliquidated", is fully applicable here. The court there stated (184 F. 2d at 822):

> It is our view that it was for the trial court to determine as a question of fact the amount of the Government's loss on this item. We think it was a situation such as that discussed in Miller v. Robertson, 266 U.S. 243, at page 258, 45 S. Ct. 73, at page 78, 69 L. Ed. 265, where the court said: "Generally, interest is not allowed upon unliquidated damages. * * * But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.
>
> The rule permitting an award of interest "in the discretion of the court" is one of general recognition. Restatement of the Law of Contracts, § 337(b). Such a discretion, in a proper case, may be that of judge or of jury, but like other questions of the amount of damages, it is a question for the trial court, and it is its discretion that has been exercised here. We are not permitted to disturb it, for we think the court might properly conclude that the Government could not otherwise be made whole in respect to what it lost * * * .

In the instant case, as in Continental Oil, the government was deprived of the use of its money solely as a result of the defendant's conduct. Here, as there, the district court awarded prejudgment interest in order to make the government whole. In this case, as in Continental Oil, the award was a proper exercise of the trial court's discretion which should not be disturbed on appeal.

CONCLUSION

For the reasons stated above and in our main brief: (1) to the extent the judgment of the district court denies the United States the relief sought, it should be reversed and the case remanded to the district court for the entry of an additional judgment against the appellees in the amount of $1,168,671 (or, if the Court adopts the Government's alternative position, in the amount of $1,145,241) together with interest at 6 percent per annum from the dates of the overpayments until the judgment is paid; [14/] and (2) to the estent the judgment of the district court awards the United States the relief sought, it should be affirmed and the judgment entered in this Court, pursuant to Rule 24(1) of

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14/ See note 55 on page 93 of our main brief.

the Court's rules, for interest on the judgment below from April 27, 1966 (the date of entry of the judgment) until it is paid. 15/

Respectfully submitted,

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DECEMBER 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard S. Salzman
RICHARD S. SALZMAN
Attorney.

15/ See note 56 on page 94 of our main brief.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

RICHARD S. SALZMAN, being duly sworn, says:

That on December , 1967, he caused three copies of the foregoing reply brief for the United States as appellant and answering brief as cross-appellee to be served upon appellees, cross-appellants by placing them in the United States Mail, air mail postage prepaid, in an envelope addressed to counsel as follows:

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RICHARD S. SALZMAN
Attorney,
Department of Justice,
Counsel for appellee.

Subscribed and Sworn to before
me this day of December, 1967.

[Seal]

NOTARY PUBLIC

My Commission expires April 14, 1972.